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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-623

KENNETH TIERNEY, PETITIONER

v.

UNITED STATES OF AMERICA

MATHIAS REILLY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 465 F. 2d 806. The opinion of the district court (Pet. App. 17a-25a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1972. The consolidated petition for a writ of certiorari was filed on October 20, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below properly determined *ex parte* and *in camera* that an overhearing of a defense lawyer in the course of a court-authorized electronic surveillance, which was not directed at petitioners or their attorneys, was unrelated to petitioners' attorney-client relationship and therefore did not have to be disclosed.

2. Whether petitioners would be subject to a substantial threat of foreign prosecution on the basis of grand jury testimony that has been sought from them under a grant of "use immunity."

3. Whether petitioners have any ground to challenge the procedures by which the Department of Justice determined to apply for a judicial conferral of "use immunity" on them.

STATEMENT

After being granted immunity under 18 U.S.C. 6002, petitioners nevertheless refused to answer questions posed by a federal grand jury in Fort Worth, Texas,[1]

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[1] The grand jury was investigating possible violations of Title I of the Gun Control Act of 1968 (18 U.S.C. 921, *et seq.*), Title II of the Gun Control Act of 1968 (26 U.S.C. 5861), Title XI of the Organized Crime Control Act of 1970 (18 U.S.C. 842, *et seq.*), the

and were held in civil contempt by the United States District Court for the Northern District of Texas.[2]

Petitioners were subpoenaed on June 13, 1972, to appear before the Fort Worth grand jury on June 19. When called, each man was asked questions relating to the purchase of firearms. All five petitioners refused to answer these questions; they based their refusals on various grounds, including the First, Fourth, Fifth, Sixth, and Ninth Amendments to the United States Constitution. The United States Attorney then filed applications seeking grants of immunity for petitioners pursuant to 18 U.S.C. 6002, accompanying each application with a letter signed by the Acting Assistant Attorney General in charge of the Internal Security Division stating that the United States Attorney was authorized to apply for an immunity order (I App. 114; II App. 379-380).[3]

The court held hearings with respect to the granting of immunity to petitioners.[4] After petitioners had moved for disclosure of electronic surveillance, the court ordered the government in the Reilly hearing to "affirm or deny whether there has been any electronic surveillance or wiretapping on any one of these wit-

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Foreign Agents Registration Act (22 U.S.C. 611, *et seq.*), and the general conspiracy statute (18 U.S.C. 371).

[2] Petitioners are currently free on bail pursuant to an order (Pet. App. 26a-27a) and opinion (Pet. App. 28a-30a) by Mr. Justice Douglas on September 12, 1972.

[3] "App." refers to the Appendix filed in the court of appeals.

[4] There was a separate hearing for petitioner Tierney (see I App.) and a later, consolidated hearing for petitioners Reilly, Morahan, Crawford and Laffey (hereinafter the Reilly hearing) (see II App.).

nesses or on any one of their lawyers" (II App. 453).[5] The government attorneys stated that a search of the government's records had disclosed no information that petitioners had been overheard by electronic surveillance or that any premises in which they had a proprietary interest had been the subject of electronic surveillance; with respect to petitioners' lawyers, the government attorneys had no knowledge of any electronic surveillance, but had not ordered a search of the records since they had not known of the lawyers until shortly before the hearings (II App. 455). The court then ordered a recess to allow such a search to be conducted (II App. 492).[6] When the hearing reconvened, a government attorney testified that a check with the appropriate governmental agencies had revealed no "electronic surveillance on the telephones of any of the [petitioners] or Counsel" and no "overhearing of these individuals" (II App. 523).

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[5] The quotation is from the Reilly hearing on June 23, 1972. During the Tierney hearing on June 20, 1972, the court inquired "whether or not the lawyers' telephone lines have been tapped" (I App. 243). The government attorney stated that until shortly before the hearing he had not even heard of petitioners' attorneys, that he had "no information that there was any electronic surveillance concerning the lawyers' lines," and that he firmly believed that "there was no type of wiretap at all on the attorney[s]" (I App. 243-244). When one of the attorneys from the Department of Justice stated that a search of the various federal investigative agencies disclosed no surveillance with respect to petitioner Tierney, the court inquired "How about the lawyers?" (I App. 253). The government attorney responded "The lawyers? I have never heard their names before until I heard them in Fort Worth" (*ibid.*).

[6] The court also instructed the government to determine whether any electronic surveillance had been conducted with respect to petitioners in the interim since the government had originally searched its records (II App. 521-522).

The court then entered orders granting petitioners immunity and requiring them to appear before the grand jury to answer questions and to testify (see, *e.g.*, I App. 11, II App. 308-309). Upon recall, however, petitioners again refused to testify. The government in each case applied for a "show cause" order as to why they should not be held in contempt. After a hearing, the court found petitioners in civil contempt; the court ordered each petitioner incarcerated until he agreed to testify or until the grand jury expired (Pet. App. 6a).[7] The subsequent appeals were heard on a 30-day expedited basis pursuant to 28 U.S.C. 1826(b).

On July 18, 1972, during preparation of the appeal, the government attorneys for the first time learned that one of petitioners' attorneys had been overheard on one occasion on June 17, 1972, during a surveillance conducted pursuant to court order (Pet. App. 13a). None of the petitioners nor the overheard attorney was the subject of this surveillance, and it did not involve any premises in which petitioners or the attorney had a proprietary interest. Nevertheless, pursuant to 18 U.S.C. 2518(8)(b), the government obtained from the court that had authorized the surveillance an order permitting disclosure of the application and order to the court of appeals; the government submitted those documents and the log of the overhearing to the court of appeals for its *in camera* review.[8]

The court of appeals affirmed (Pet. App. 1a-16a),

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[7] The term of the grand jury will expire in November 1973.

[8] This exhibit was lodged with the Clerk of this Court on the two occasions when these petitioners applied for bail, and we are herewith lodging it again.

rejecting petitioners' contention that they were possibly subject to prosecution in Great Britain and that the granting of use immunity was insufficient to compel them to testify over their assertion of their Fifth Amendment privilege against self-incrimination; and petitioners' contention that the Department of Justice failed to follow its guidelines in applying for immunity for petitioners. The court also rejected petitioners' claim that they were entitled to refuse to testify because of electronic surveillance conducted by the government. Although the overhearing of petitioners' attorney became known to the government attorneys only after the decision of the district court, the court of appeals examined the transcript of this overhearing *in camera* and concluded: "It contains nothing of evidentiary substance nor does it in anywise have to do with the right to counsel or the adequacy of representation by counsel. This incident does not afford a basis for the refusal of [petitioners] to testify before the grand jury" (Pet. App. 13a).

ARGUMENT

1. Unlike *Gelbard* v. *United States*, 408 U. S. 41, 47, this is not a case where "the Government has intercepted communications of the witnesses" and seeks testimony derived from the intercepted communications. Petitioners in this case were not the object of any electronic surveillance, they were not overheard during the surveillance of others, and the questions directed to them by the grand jury were not derived from any intercepted communications.[9]

[9] The overhearing in question took place after the subpoenas were issued, and the government attorneys did not even know of the

Yet petitioners claim they had "just cause" under 28 U.S.C. 1826(a), to refuse to comply with the court's order requiring them to answer the grand jury's inquiries. They base this claim on the Sixth Amendment because one of their attorneys had, on a single occasion, been overheard during a court-authorized surveillance directed at a third person without knowledge of the government attorneys in charge of this case. Petitioners argue further that they were entitled to disclosure of the transcript of this overhearing (which the government attorneys submitted to the court of appeals *in camera* when it was discovered) and to an evidentiary hearing. We submit that the court below correctly rejected petitioners' arguments in this regard.

The threshold question here is one of standing. In overhearing cases involving the Fourth Amendment, this Court has refused to adopt the approach advocated by petitioners. In *Alderman* v. *United States*, 394 U.S. 165, the Court held that when the government has illegally engaged in electronic surveillance and has either intercepted conversations of the defendant or conversations occurring on his premises (394 U.S. at 176)—neither of which occurred in the present cases—then the defendant has standing to claim that his conviction has been or would be procured through evidence obtained in violation of his Fourth Amendment rights. Once that preliminary determination of his standing has been made, then the "surveillance records as to which any petitioner has standing to object should be turned over to him without being screened *in camera* by the trial judge" (*id.* at 182). *Alderman* thus decided

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overhearing when petitioners came before the grand jury (Pet. App. 13a; II App. 523).

only that there must be disclosure for an adversary hearing if the defendant has the requisite standing to require this. See 394 U.S. at 185-186. In *Giordano* v. *United States,* 394 U.S. 310, 313, the Court explicitly pointed out that "disclosure and further proceedings" would not be required if the defendant did not have standing. As Mr. Justice Stewart observed in his concurring opinion in *Giordano,* 394 U.S. at 314: "We have nowhere indicated that this [threshold] determination cannot appropriately be made in *ex parte, in camera* proceedings." The Court repeated this in *Taglianetti* v. *United States,* 394 U.S. 316, 317, stating: "Nothing in *Alderman* v. *United States* * * * requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance." In accordance with that interpretation of *Alderman,* the Court held that a trial judge had followed the proper procedure to determine standing when he examined the transcript of the intercepted communications *ex parte* and *in camera.* 394 U.S. at 317-318.

In the present case, petitioners assert no Fourth Amendment claim, since they were not overheard and no premises in which they have an interest were the subject of electronic surveillance. Thus they have no "unlimited license to rummage in the files of the Department of Justice" (*Alderman* v. *United States, supra,* 394 U.S. at 185) to examine the logs of interceptions, except to the extent that they have standing under the Sixth Amendment to do so. But it is well settled that a person has standing to raise a Sixth Amendment challenge to government surveillance of

another person only if the intercepted communication is within his personal attorney-client privilege. See *Black* v. *United States*, 385 U.S. 26; *Hoffa* v. *United States*, 385 U.S. 293, 304-309; *O'Brien* v. *United States*, 386 U.S. 345. If petitioners do not have standing, however, they are not entitled to disclosure of the intercepted communication. See, *e.g.*, *United States* v. *Seale*, 461 F. 2d 345, 364 (C.A. 7); *United States* v. *Zarzour*, 432 F. 2d 1, 4 (C.A. 5). As the court held in *United States* v. *Hoffa*, 436 F. 2d 1243, 1246 (C.A. 7), certiorari denied, 400 U.S. 1000, "defendants certainly have no standing to require production of logs of overhearings of conversations between their attorneys and other clients [or other persons] concerning matters totally unrelated to this case."

As with the determination of standing to raise Fourth Amendment claims, the proper procedure for determining standing in these circumstances is for the appropriate court to inspect the logs *in camera*. This is the uniform view of the courts of appeals. See, *e.g.*, *United States* v. *Seale*, *supra*; *United States* v. *Zarzour*, *supra*; *United States* v. *Hoffa*, *supra*, 436 F. 2d at 1246; *United States* v. *Kane*, 450 F. 2d 77, 82 (C.A. 5), certiorari denied, 405 U.S. 934; *Jones* v. *United States*, 443 F. 2d 822 (C.A. 9); *United States* v. *Battaglia*, 410 F. 2d 279 (C.A. 7), certiorari denied, 396 U.S. 848. The court below, therefore, correctly rejected petitioners' contention that the intercepted communication must be divulged to them and that an adversary hearing must be held to determine "the relevance of an attorney's wiretapped conversation to his representation of petitioners" (Pet. 11), since this would amount to requir-

ing disclosure in order to decide whether petitioners have standing to require disclosure. Having found that the log it properly reviewed *in camera* "contains nothing of evidentiary substance nor does it in anywise have to do with the right to counsel or the adequacy of representation by counsel" (Pet. App. 13a), the court below had a solid basis for holding that petitioners had no standing to examine the log or litigate its content.

Moreover, the issue in this case is only whether petitioners had any "just cause" to refuse to obey the district court's orders requiring them to answer grand jury questions, when there was no overhearing of their conversations with their lawyers, and the overhearing of one of their lawyers conversing with another person occurred as a result of a court-authorized surveillance of someone other than the attorney or petitioners. Whatever may be the preferred course in a criminal prosecution when conversations between a defendant and his counsel are overheard, the special nature of a grand jury proceeding makes an *ex parte* judicial determination particularly appropriate for determining at this preliminary juncture whether the attorney-client relationship is even involved. When, as here, it is determined that there is no such nexus, the questions of disclosure, taint, and "just cause," as well as the general issues petitioners discuss regarding the Sixth Amendment and the remedy for its violation, are simply not presented. In short, the court of appeals correctly decided the narrow issue involved in this case in accordance with the proper procedure, and further review is not warranted.

2. Petitioners also argue that their grants of use

immunity under 18 U.S.C. 6002-6003 inadequately safeguarded their Fifth Amendment privilege against self-incrimination, claiming that the Fifth Amendment protects against the threat of compelled incrimination under foreign law and that their grand jury testimony might have incriminated them under the laws of Great Britain. However, that preliminary contention about the proper scope of the privilege need not be considered because, as in *Zicarelli* v. *New Jersey Investigation Commission,* 406 U.S. 472, 480, the present petitioners were "never in real danger of being compelled to disclose information that might incriminate [them] under foreign law." As the Court held in *Zicarelli, supra,* 406 U.S. at 478, "[i]t is well established that the privilege protects against real dangers, not remote and speculative possibilities." In *Zicarelli,* the nature of the questioning showed there was no real risk of incrimination under foreign law. In the present case, we agree with the court of appeals (Pet. App. 8a-11a) that there is a different but equally conclusive reason to find no significant danger of incrimination. The questions asked here were in the secrecy of grand jury proceedings and, if petitioners had testified, there would have been no substantial risk of foreign prosecution on the basis of their answers. Petitioners hypothesize a number of circumstances where grand jury testimony might be disclosed, including the prosecution of a witness for perjury (Pet. 22, n. 28). But all of these suggested possibilities reflect mere speculation not approaching the "real and appreciable" dangers—as distinguished from "trifling" or "remote possibilities out of the ordinary course of law"—that must

underlie a valid claim of the privilege (even assuming *arguendo* it would apply). See *Marchetti* v. *United States,* 390 U.S. 39, 48, 53; *Grosso* v. *United States,* 390 U.S. 62, 66. As the court below explained, the same court that orders the testimony before its grand jury has ample power to protect the secrecy of the testimony given (Pet. App. 9a). Thus, there is no reason to believe that petitioners' testimony, given in secret before the grand jury, would ever be made public, or that it would be made available to a foreign government to use in prosecuting them. See *In re Parker,* 411 F. 2d 1067, 1969-1070 (C.A. 10), vacated as moot *sub nom. Parker* v. *United States,* 397 U.S. 96.

In addition, the grand jury questions set forth in the Petition, at pp. 17-19, n. 25, are not inquiries concerning foreign involvements and, for this reason as well, do not pose "a substantial risk of incrimination under foreign law." *Zicarelli* v. *New Jersey Investigation Commission, supra,* 406 U.S. at 479-480; see also *id.* at 479, n. 17. As in *Zicarelli,* 406 U.S. at 478-479, petitioners have quoted only newspaper articles to demonstrate their fear of foreign prosecution (Pet. 16-17, n. 24). This Court's conclusion in *Zicarelli,* 406 U.S. at 481, that the constitutional question was not presented is fully applicable here, especially since the questions propounded were in the secrecy of grand jury proceedings.

3. There is nothing to petitioners' contention that the government failed to follow its internal procedures with respect to applications for immunity. The Department of Justice policy, quoted at Pet. 23,[10] was

[10] Department of Justice, *A Practical Handbook of Federal Grand Jury Procedure,* § 4:3:2, p. 47 (1968 ed.).

fully adhered to: each application for immunity was accompanied by a letter of authorization to the United States Attorney, signed by the Acting Assistant Attorney General in charge of the Internal Security Division indicating the approval required by statute, 18 U.S.C. 6003 (I App. 114; II App. 379-380).[11] While we agree with the court of appeals that the guidelines relating to internal approval of the submission of immunity requests "are not directed to the procedural or substantive rights of prospective witnesses" (Pet. App. 14a), these guidelines were actually followed.[12] The Assistant Attorney General's letter states, as required by the statute, that authorization is given "upon consideration of your [the United States Attorney's] request" since the testimony is "necessary and in the public interest" and further notes that the Assistant Attorney General in charge of the Criminal Division also concurred in the authorization (I App. 114).

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[11] As the court below observed, "The Acting Assistant Attorney General in charge of the Internal Security Division of the Department of Justice authorized the seeking of the grants of use immunity by the United States Attorney and recited that the testimony sought was necessary and in the public interest. This was in compliance with the statutory requirements" (Pet. App. 14a). The statute requires approval by the Attorney General or a designated Assistant Attorney General, and the official who certified his approval has been so designated. See 28 C.F.R. 0.175 (December 23, 1970); See also *In re Horn*, 458 F.2d 468, 473 (C.A. 3).

[12] Petitioners' allegation (Pet. 24) that government counsel professed ignorance of the guidelines, in effect admitting noncompliance, is not accurate. The Assistant United States Attorney, Mr. McCown, said only that a letter from the Deputy Attorney General to the Chairman of the House Judiciary Committee explaining the policy (Pet. App. 34a-41a) had "not been circulated in our office" (I App. 110); he nowhere indicated that the policies expressed in that letter had not been followed.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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